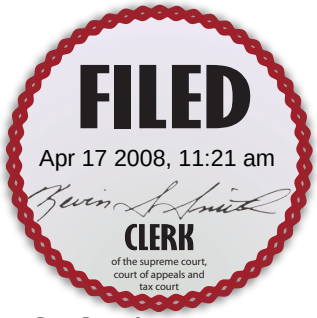

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IN THE
COURT OF APPEALS OF INDIANA

LEONARD BREWER, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0709-CR-786
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0606-FD-36

April 17, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Leonard Brewer, Jr., appeals his convictions for Possession of Cocaine, as a Class D felony; Obstruction of Justice, as a Class D felony; Possession of Paraphernalia, as a Class A misdemeanor; Resisting Law Enforcement, as a Class A misdemeanor; and being an Habitual Substance Offender following a jury trial. Brewer presents five issues for review, which we consolidate and restate as:

1. Whether the trial court abused its discretion when it admitted certain evidence.

2. Whether the evidence is sufficient to support his conviction for obstruction of justice.

We affirm.

FACTS AND PROCEDURAL HISTORY

On March 10, 2006, Lafayette Police Officers Clyde, Walters, and Dombkowski went to the apartment of Samuel Hammel in Lafayette to serve an arrest warrant on Elizabeth Nelson. Hammel, who had three guests in the front room, consented to entry by the officers. The guests advised the officers that Nelson was in the back of the apartment.

The officers spoke to Nelson through a closed door. When Nelson opened the door, the officers saw Brewer lying on a mattress on the floor. No part of Brewer was covered except his hands, which were in front of him under a blanket. When the officers asked Brewer to show his hands, Brewer slowly pulled his hands out from under the blanket, but then quickly reached behind the door to his jacket. Officer Clyde, who had

struggled with Brewer in a prior incident, patted Brewer down out of concern for officer safety.

About the same time, Officer Dombkowski saw something yellowish and dime-sized in Brewer's mouth. Officer Clyde also observed that Brewer appeared to have something in his mouth. Officer Dombkowski believed that the substance was cocaine, so he handcuffed Brewer and demanded five or ten times that Brewer spit out what was in his mouth. Brewer did not, but made swallowing motions with his mouth and throat. Brewer also began resisting Officer Dombkowski. He opened his mouth slightly at one point, and Officer Dombkowski saw what he believed to be a piece of crack cocaine. Brewer resisted, and three officers were required to subdue him.

Officer Walters grabbed Brewer and escorted him from the apartment outside to the police car.[1] Once at the car, Brewer refused Officer Walters' request to inspect the inside of Brewer's mouth, but Officer Walters saw a white rock-like substance on Brewer's lips. Officers Walters and Dombkowski then took Brewer to St. Elizabeth Hospital's emergency room, where medical personnel examined him.

Officer Clyde met with Brewer before the medical examination. Brewer had not yet been Mirandized, but he volunteered, "I've got something to tell you. I didn't swallow nothing. I have an allergic reaction to that shit," and he said it was all smoked prior to the police arriving. Transcript at 242. Brewer further explained that his mouth

[1] Once Brewer was removed, the remaining officer searched the bedroom and mattress. They found three crack pipes under the blanket where Brewer's hands had been. The pipes tested positive for cocaine residue.

movements were the result of an allergic reaction to the cocaine he had smoked before officers arrived at the apartment.

Dr. Seall examined Brewer to clear him medically for transport to the jail. During the examination, Brewer told Dr. Seall that he had ingested cocaine. Brewer was given an EKG, and hospital personnel withdrew and tested Brewer's blood and urine. Medical personnel monitored Brewer's condition for four hours, and he was then discharged to the care of the police officers.

On June 2, 2006, the State charged Brewer with possession of cocaine, as a Class D felony; obstruction of justice, as a Class D felony; possession of paraphernalia, as a Class A misdemeanor; resisting law enforcement, as a Class A misdemeanor; and being an habitual substance offender. On March 29, 2007, Brewer filed motions to suppress evidence regarding (1) statements made as a product of an illegal arrest, (2) Miranda violations, and (3) a search incident to his arrest. And on June 1, 2007, Brewer filed motions to suppress alleging bodily intrusions as well as deprivation of due process and the use of unreasonable and excessive force. The court reserved to the first day of trial the arguments regarding the suppression motions "on all issues involving the hospital." Appellant's App. at 3. But, on June 19, the court held a hearing on the motions to suppress on "all issues involving the apartment" and, at the close of the hearing, denied those motions. Id.

The jury trial commenced on June 21, 2007. At the start of trial, the court heard arguments on Brewer's remaining suppression motions and then denied those motions. After the jury returned a verdict convicting Brewer of possession of cocaine, obstruction

of justice, possession of paraphernalia, and resisting law enforcement, the jury heard evidence on the habitual substance offender allegation. The jury also found Brewer to be an habitual substance offender.

On July 26, 2007, the trial court sentenced Brewer to three years for possession of cocaine, three years for obstruction of justice, one year for possession of paraphernalia, and one year for resisting law enforcement, to run concurrently. The court enhanced the sentence by six years for Brewer's habitual substance offender status. The aggregate sentence is nine years, with eight years executed and one year suspended. Brewer now appeals.[2]

DISCUSSION AND DECISION

Issue One: Admission of Evidence

Brewer contends that the trial court abused its discretion when it denied his motions to "suppress the results of a warrantless and non-consensual search of Brewer's bodily fluids" and privileged physician/patient communications. Appellant's Brief at 10. He also argues that the trial court abused its discretion by admitting evidence of prior bad acts and hearsay. We address each contention in turn.

Standard of Review

With regard to the trial court's denial of motions to suppress, Brewer challenges the admission of evidence following his conviction rather than in an interlocutory appeal.

[2] Brewer has included a complete copy of the transcript in his six-volume appendix. This practice not only violates Indiana Appellate Rule 50(A)(g), which instructs appellants to include "brief portions of the Transcript . . . that are important to a consideration of the issues raised on appeal," but results in an unwieldy file. (Emphasis added.) We urge Brewer's counsel to abide by this important rule in the future. We also observe that the table of contents for the appendix is not completely accurate, also making our review and use of the appendix very difficult.

Thus, the issue is more appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial.[3] Bentley v. State, 846 N.E.2d 300, 304 (Ind. Ct. App. 2006), trans. denied. A trial court is afforded broad discretion in ruling on the admissibility of evidence, and we will reverse such a ruling only upon a showing of an abuse of discretion. Id. An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. Roush v. State, 875 N.E.2d 801, 808 (Ind. Ct. App. 2007).

Bodily Fluids

Brewer first contends that the trial court abused its discretion when it admitted evidence of the results of tests performed on his bodily fluids. Specifically, he argues that the trial court should not have admitted the hospital test results in State's Exhibit 5, comprised of Dr. Seall's dictated report. Brewer contends that the test results were inadmissible because they were obtained without a warrant or under any exceptions to the warrant requirements set forth in the Fourth Amendment to the United States Constitution or Article I, Section 11, of the Indiana Constitution.

But Brewer also offered the same test results into evidence as Defendant's Exhibit A. That exhibit is comprised of all of Brewer's medical records from that hospital visit, including Dr. Seall's dictated report. Thus, the admission of State's Exhibit 5 is merely cumulative and, as such, any error in its admission is harmless. See Beach v. State, 816 N.E.2d 57, 60 (Ind. Ct. App. 2004) (noting cumulative evidence constituted harmless error). Brewer's contention must fail.

[3] Because we review a post-trial appeal from the denial of a motion to suppress as an appeal challenging the admission of evidence, we need not address Brewer's argument that the trial court erred when it denied Brewer's June 1, 2007, motion to suppress the bodily fluid issue.

Physician-Patient Privilege

Brewer also contends that the physician-patient privilege barred the admission of Dr. Seall's testimony about his examination of and conversation with Brewer. The State acknowledges that a physician cannot be required to testify as to communications with or advice given to patients but argues that any error in the admission of Dr. Seall's testimony is harmless. We agree with the State.

Indiana Code 34-46-3-1(2) provides: "Except as otherwise provided by statute, the following persons shall not be required to testify regarding the following communications: . . . Physicians, as to matters communicated to them by patients, in the course of their professional business, or advice given in such cases." On direct questioning by the State, Dr. Seall testified that he had treated Brewer after police officers brought him to the hospital, had tested positive for cocaine, and had admitted to him that he had ingested cocaine. Brewer timely objected on the basis of the statutory doctor-patient privilege, but the trial court overruled his objection.

But the State argues, and we agree, that any error in the admission of Dr. Seall's testimony is harmless. As noted above, Brewer himself offered into evidence his entire medical record from the hospital visit, and that record included a report showing his positive test results for cocaine. Officer Clyde testified that Brewer volunteered to him, en route to the hospital, that he had not swallowed any cocaine but he had smoked it before the police arrived at the apartment. And Officer Dombkowski states in his report, which was admitted into evidence as Defendant's Exhibit B, that Brewer told him at the

hospital that "he thought he had kicked his crack habit, but just got back to it this evening." Defendant's Exhibit B at 2.

Independent evidence supports Brewer's conviction for possession of cocaine. As such, any error in the admission of Dr. Seall's testimony was harmless.[4] See Beach, 816 N.E.2d at 60. Brewer's contention regarding Dr. Seall's testimony must fail.

Prior Bad Acts

Brewer contends that the trial court abused its discretion when it admitted evidence of his prior bad acts. Specifically, he argues that Indiana Evidence Rule 404(B) barred the admission of testimony by Officer Clyde regarding a previous struggle between Officer Clyde and Brewer. The State counters that Brewer has waived the argument. We agree with the State.

On direct examination during trial, Officer Clyde testified, in relevant part, as follows:

> Q: And would it be accurate to say on a prior occasion [Brewer] struggled with you in your duties as a police officer?
>
> A: Yes.

Transcript at 187. Brewer did not object to that testimony. Later, at a sidebar during redirect examination of Officer Clyde, the State announced its intention to elicit testimony that Officer Clyde was injured in that previous encounter with Brewer. The trial court overruled Brewer's objection. The State then asked Officer Clyde whether he

[4] In a footnote, Brewer argues that he sought the admission of Defendant's Exhibit A under the doctrine of completeness pursuant to Indiana Evidence Rule 106 and, therefore, he has not waived his underlying objection to the admission of that exhibit. But that rule pertains only to the admission of complete documents "[w]hen a writing or recorded statement or part thereof is introduced" into evidence. Evid. R. 106. Brewer asserted the rule in reference to Dr. Seall's testimony, which was not a written record. Therefore, Rule 106 does not apply.

remembered being injured in his prior struggle with Brewer. Officer Clyde stated that he did not remember sustaining an injury.

The failure to make a contemporaneous objection to the admission of evidence at trial, so as to provide the trial court an opportunity to make a final ruling on the matter in the context in which the evidence is introduced, results in waiver of the error on appeal. Brown v. State, 783 N.E.2d 1121, 1125 (Ind. 2003). Here, Brewer did not object to Officer Clyde's testimony, on direct examination, that the officer in his official capacity had previously struggled with Brewer. Thus, the issue is waived. And Officer Clyde's testimony on redirect is merely cumulative of his testimony on direct examination. As such, any error in the admission of Officer Clyde's testimony on redirect is harmless. See Beach, 816 N.E.2d at 60. Brewer's contention regarding prior bad acts evidence must fail.

Hearsay

Brewer also asserts that the trial court abused its discretion when it admitted hearsay testimony from Officer Clyde. Specifically, Officer Clyde testified that Nelson, at the time of her arrest, said that she thought Brewer had swallowed a large rock of crack cocaine. But Brewer does not demonstrate, by citation to the record, a contemporaneous objection or a continuing objection to that testimony.[5] As such, the issue is waived. See Brown, 783 N.E.2d at 1125. Waiver notwithstanding, we address the merits of his claim.

[5] The State's questioning indicates that Brewer may have registered a continuing objection to the hearsay testimony at issue. However, the allusion to a possible continuing objection is insufficient to preserve the issue for review. See Ind. Appellate Rule 46(A)(8)(a) (requiring parties to support each contention with "citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on").

Indiana Evidence Rule 801(c) defines hearsay as "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is not admissible unless if falls within one of the hearsay exceptions. See Ind. Evid. R. 802. But a timely and accurate admonition to jury is presumed to cure any error in the admission of evidence. Clark v. State, 695 N.E.2d 999, 1004 (Ind. Ct. App. 1998), trans. denied.

Here, Officer Clyde testified as follows:

> Q: Okay. Now you're talking to Elizabeth Nelson, and again I think this is where the objection came in, you don't know whether she's telling you the truth but she tells you something about Leonard Brewer, correct?
>
> A: Yes.
>
> Q: Okay. And what does she tell you?
>
> A: She says that earlier in her bedroom he had a large crack rock that he was attempting to break up to smoke in a crack pipe[.]
>
> Court: I need to advise the jury that the testimony concerning [the] witness statement of Elizabeth Nelson is not offered for the truth of the statement but only to demonstrate the state of mind of the officer. Go ahead.
>
> Q: And that he was – he had a large rock of crack?
>
> A: Yes.
>
> Q: And he was breaking it up?
>
> A: Yes.
>
> Q: And what else does she tell you?
>
> A: She believed he swallowed it[.]

Transcript at 219-20.

The trial court advised the jury that the testimony regarding Nelson's statement was not being offered for the truth of the matter asserted. Thus, any error in the admission of the hearsay testimony was cured by the admonition. Clark, 695 N.E.2d 1004. Moreover, the admission of hearsay testimony on redirect was harmless because it was merely cumulative of Officer Clyde's testimony on direct examination. See Beach, 816 N.E.2d at 60. And, not least, the evidence was admitted to show the police officers' states of mind when they decided to transport Brewer to the hospital for medical clearance. Nelson's statement that she thought Brewer swallowed a rock of crack cocaine strengthened the officers' suspicions, based on Brewer's conduct, that Brewer had something in his mouth. Brewer's argument must fail.

Issue Two: Sufficiency of Evidence

Brewer also contends that the evidence is insufficient to support his conviction for obstruction of justice. When reviewing the claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

To prove obstruction of justice, the State was required to show beyond a reasonable doubt that Brewer removed something, namely a rock of crack cocaine, "with intent to prevent it from being produced or used as evidence in any official proceeding or

investigation[.]" Ind. Code § 35-44-3-4. The evidence shows that, when officers asked Brewer to show his hands, Brewer slowly pulled his hands out from under a blanket but then made a quick, furtive movement to a coat behind the bedroom door. Out of concern for their safety, the officers patted Brewer down to check for weapons, at which time Officers Clyde and Dombkowski noticed that Brewer appeared to have something dime-sized and yellowish in his mouth. Officer Dombkowski demanded five or ten times that Brewer spit out what was in his mouth, but Brewer did not comply. Instead, Brewer made swallowing motions with his mouth and throat. Tests performed later at the hospital confirmed that Brewer had cocaine in his system.

This evidence is sufficient to support Brewer's conviction for obstruction of justice. Brewer argues that there is "no evidence to support the allegation that Brewer ingested cocaine in order to hide it from the police." Appellant's Brief at 22. But Brewer's conduct in chewing something and refusing to spit anything out or otherwise show that his mouth was empty belie that claim. In any event, Brewer's argument amounts to a request that we reweigh the evidence, which we cannot do. See Jones, 783 N.E.2d at 1139. Thus, Brewer's contention is without merit.

Affirmed.

SHARPNACK, J., and DARDEN, J., concur.